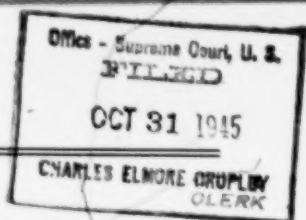


22  
No. 573



IN THE

# Supreme Court of the United States

\_\_\_\_\_  
OCTOBER TERM, 1945.  
\_\_\_\_\_

Estate of HUMPHREY J. LYNCH, deceased, THE  
COUNTY TRUST COMPANY and MARY A. FLEM-  
ING, Executors,

*Petitioners,*

against

THE COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI AND  
BRIEF IN SUPPORT OF PETITION.**  
\_\_\_\_\_

WARNER PYNE,  
MONROE J. CAHN,

*Counsel for Petitioners.*

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Estate of HUMPHREY J. LYNCH, deceased, THE  
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*Petitioners,*

against

THE COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI.**

*To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

Your petitioners, The County Trust Company and Mary A. Fleming, as executors under the last Will and Testament of Humphrey J. Lynch, deceased, respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that court affirming (Judge Swan dissenting) a determination of the Tax Court of the United States sustaining a deficiency income tax assessment against decedent.

The opinion of said court was filed on August 7th, 1945, and is reported in 150 Fed. (2d) 747.

A transcript of the record, including the proceedings in the said Circuit Court of Appeals, is furnished herewith in accordance with rule 38 of this Court.

### **Summary and Short Statement of the Matter Involved.**

#### **Nature of Suit and Decisions Below.**

The facts which are not in dispute are fully set forth in the prevailing opinion of Judge Augustus N. Hand below and may briefly be summarized as follows:

In 1931, decedent, an attorney, practicing in White Plains, New York, in payment and discharge of a fee in the sum of \$5000 owing to him by his clients, the Misses Margueritte H. Lynch, Elizabeth F. Lynch and Anna L. Lynch (not related to decedent), for services rendered to them in establishing claims in their behalf in the total sum of \$56,160 against the estate of one John H. McArdle, deceased, took an assignment of those claims to the extent of \$5000.

The claims were established against the said estate of John H. McArdle, deceased, in an accounting proceeding in the Surrogate's Court of Westchester County by a decree of that court, dated October 30th, 1931, in which decree the court found the assets of the said estate at the date of McArdle's death to have been \$400,920.10 and the liabilities, including the claims of the Misses Lynch, \$139,780, leaving an apparent surplus of \$261,139.90.

The executors of the McArdle estate appealed from so much of the decree as established the claims of the Misses Lynch and they appealed from other portions of the decree adverse to them. Both appeals were subsequently withdrawn, the precise date of which the record does not show

(cf. Record, pp. 25, 32). However, the record does show that on February 2nd, 1935, decedent herein waived his right to receive a dividend then about to be paid on the claims of the Misses Lynch in the sum of \$1,839.50 so that they themselves right receive it (Record, pp. 24, 30).

In 1933, the McArdle estate became insolvent as the result of the failure of a national bank, a substantial block of the stock of which was one of the principal assets of the McArdle estate. Nevertheless in 1940, two years after the death of decedent herein on January 24th, 1938, decedent's estate received from the McArdle estate payment in full of the \$5000 assignment.

Decedent, who was on a cash basis, never included the \$5000 fee in any income tax return. Petitioners herein filed a return for him for the period from January 1st, 1938 to January 24th, 1938, on which latter date, as stated, he died. In auditing said return, respondent included the \$5000 fee as accrued income and assessed a deficiency tax of \$484.21 by reason thereof (Record, p. 7).

Petitioners duly sought review by the Tax Court of the United States, which affirmed the Commissioner. Petition for review to the United States Circuit Court of Appeals for the Second Circuit followed.

The position taken by petitioners throughout may be thus simply stated:

Inasmuch as the assignment was taken by decedent in 1931 in payment and absolute discharge of the fixed debt due him for his services, under the clear and comprehensive language of section 22a of the Revenue Act of 1928

defining income as including "compensation for personal service, of whatever kind and in whatever form paid, or from professions \* \* \*," the assignment constituted income to decedent in that year, the value of which was presumptively fixed at the sum of \$5000 by virtue of the provisions of Article 53 of Treasury Regulation 74, then in effect, reading as follows:

"Art. 53. Compensation paid other than in cash.—Where services are paid for with something other than money, the fair market value of the thing taken in payment is the amount to be included as income. If the services were rendered at a stipulated price, in the absence of evidence to the contrary such price will be presumed to be the fair value of the compensation received. \* \* \*"

Having thus been paid and discharged in 1931, under no circumstances could the fee owing from the Misses Lynch be deemed to be owing at the date of decedent's death on January 24th, 1938 as the Commissioner assumed, and treated as accrued income within the meaning of section 42 of the Revenue Act of 1938.

The Tax Court, although finding that the debt had been paid by the acceptance of the assignment, nevertheless sustained the Commissioner on the ground (Record, p. 16) that it was unable to find that at the date of decedent's death or at any time prior thereto the assignment had any market value, though there is no provision of the Revenue Act which makes market value a test of income.

The Circuit Court of Appeals ignored both of the previous reasons and upheld the deficiency upon two grounds, (a) that the decisions of this court in *North American Oil*

*v. Burnet*, 286 U. S. 417, and *U. S. v. Safety Car Heating Co.*, 297 U. S. 88,

“require us to hold that no income was realized or accrued while the appeals from the Surrogate’s decree were pending.”,

and (b) that

“the assignment, though taken in payment, should (not) be regarded as property within the meaning of the income tax law.”

In his dissenting opinion, Judge Swan took the view that “Neither the Tax Court’s theory nor my colleagues’ seems to me consonant with the statutory mandate that ‘compensation \* \* \* in whatever form paid’ be included in the attorney’s income for the year of payment—in the case at bar 1931.”

and further that, upon the proof, the assignment had at least some value in 1931 and that such value in 1931 should have been returned as income in that year and any sum in excess of such value realized in 1940, when cash of \$5000 was received, should have been reported as a gain realized on an asset of decedent’s estate.

### **The Questions Presented.**

1. Was an assignment by clients of a part of claims against a third party taken by an attorney in full payment of a fixed debt for legal services income, in the year received, 1931, to the attorney, on a cash basis, under section 22a of the Revenue Act of 1928?

2. What was the effect upon and application to the situation stated in question 1 of Article 53 of Treasury Regulation 74 applicable to the 1928 Act (section 29.22(a)-3 of present Treasury Regulation No. 111)?

3. In the situation stated in question 1, did the pendency of an appeal from a decree establishing the validity of the claims prevent the assignment of part thereof from being income in 1931 within the meaning of said section 22a?

4. In the situation stated in question 1, was the assignment "property" within the meaning of said section 22a?

5. Where a fixed debt for legal services was paid in 1931 by the acceptance by the attorney, on a cash basis, of an assignment of part of claims due the clients from a third party, which partial assignment was not paid by the time of the death of the attorney in 1938, was either the original fixed debt due to the attorney from the clients or the assignment properly treated as accrued income to the deceased attorney and includible in his taxable income for the period in which fell the date of his death, under section 42 of the Revenue Act of 1938?

6. In the situation stated in question 5, did the fact that the attorney in 1935 might have received but waived part payment on account of his assignment, prevent the application of said section 42 in 1938?

### **Reasons Relied Upon for Allowance of Writ.**

We believe that the decision below should here be reviewed because

(1) There is involved important questions of the meaning, scope and application of section 22a of the Internal Revenue Code since it is identical with section 22A of the



Act of 1928 insofar as that section is here applicable. As Judge Swan said:

“Although the amount of tax involved in this litigation is small, the principles involved appear of sufficient importance to justify a brief statement of my reasons for disagreement with the majority opinion”.

(2) The first ground of the majority opinion below stated to be required by the decisions of this Court quoted therein is directly contrary to the first of said decisions (*North American Oil v. Burnet*) and finds no support in the second.

(3) In failing to hold that the precise value of the assignment in 1931 was irrelevant to the question of taxability in 1931, the controlling decision of this Court in *Helvering v. Enright*, 312 U. S. 636, has been ignored.

Since the questions (a) what constitutes income and (b) when such income is taxable are of major importance in the administration of the income tax laws, they should be decided by the decision of this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that Court to certify and send to this Court for hearing and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered 296, October Term, 1944, entitled Estate of Humphrey J. Lynch, deceased, The County Trust Company and Mary A. Fleming, Executors, petitioners, against Commissioner of Internal Revenue, respondent,

and that the said judgment of the United States Circuit Court of Appeals for the Second Circuit be reversed by this honorable Court and that your petitioners may have such other and further relief in the premises as to this honorable Court may seem meet and just, and your petitioners will ever pray, etc.

Dated, October 15th, 1945.

ESTATE OF HUMPHREY J. LYNCH,  
THE COUNTY TRUST COMPANY and MARY  
A. FLEMING, as Executors,  
By WARNER PYNE,  
MONROE J. CAHN,  
*Counsel for Petitioners.*

IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1945.

---

Estate of HUMPHREY J. LYNCH, deceased, THE  
COUNTY TRUST COMPANY and MARY A. FLEM-  
ING, Executors,

*Petitioners,*

against

THE COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

---

**BRIEF FOR PETITIONERS IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI.**

The opinion of the Circuit Court of Appeals for the  
Second Circuit is reported in 150 Fed. (2d) 747.

**Jurisdiction.**

The grounds for jurisdiction are:

1. The judgment of the Circuit Court of Appeals for the  
Second Circuit was filed on August 7th, 1945.
2. The judgment was rendered in proceedings to review  
an order of the Tax Court of the United States.
3. Jurisdiction is invoked under section 1141a of the  
Internal Revenue Code and section 240 of the Judicial Code.

### **Specification of Errors.**

The errors which petitioner will urge if the writ of certiorari is granted are that the Circuit Court of Appeals for the Second Circuit erred in holding:

1. That the assignment by the Misses Lynch to decedent, dated November 18, 1931, given and accepted in payment of fees due decedent, was not income to the decedent in the year received, 1931, within the meaning of section 22a of the Revenue Act of 1928.

2. That the pendency of appeals from the Surrogate's decree of October 30th, 1931 prevented said assignment from being income to decedent in 1931 within the meaning of the Revenue Act of 1928.

3. That said assignment when given in 1931 and to the time of decedent's death on January 24th, 1938 was not property within the meaning of the Revenue Act of 1928, and specifically section 22a thereof.

4. That the sum of \$5000 owing upon said assignment was includible in decedent's taxable income for the period in 1938 ending with decedent's death on January 24th, 1938, under section 42 of the Revenue Act of 1938.

### **Statutes and Regulations Involved.**

Section 22a of the Revenue Act of 1928:

“Sec. 22. Gross Income.

(a) General definition—‘Gross income’ includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, voca-

tions, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; \* \* \*".

**Section 275 (a) of the Revenue Act of 1928:**

"General Rule. The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

**Section 42 of the Revenue Act of 1938:**

"Sec. 42. Period in which Items of Gross Income Included.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period."

**Article 53 of Treasury Regulation 74, applicable to the 1928 Act:**

"Art. 53. Compensation paid other than in cash.—Where services are paid for with something other than money, the fair market value of the thing taken in payment is the amount to be included as income. If the services were rendered at a stipulated price, in the absence of evidence to the contrary such price will be presumed to be the fair value of the compensation received. \* \* \*"

## SUMMARY OF ARGUMENT.

### POINT I.

**Under section 22a of the Revenue Act of 1928 the assignment was income to decedent in 1931.**

### POINT II.

**Upon the conceded facts, section 42 of the Revenue Act, both in purpose and by its terms, was inapplicable.**

## ARGUMENT.

### POINT I.

**Under section 22a of the Revenue Act of 1928 the assignment was income to decedent in 1931.**

The provision of section 22a of the Revenue Act of 1938 here material was originally enacted in section II (b) of the Act of October 3, 1913 (38 Stat. at Large, p. 114), and thereafter continued in every revenue act, being now contained in section 22a of the Internal Revenue Code. Since the continued use of this provision evidences a fixed and uniform policy of the Congress, its meaning is of primary importance in the administration of the income tax laws. The provision is that "gross income" should include

" \* \* \* compensation for personal service \* \* \* of whatever kind and in whatever form paid or from professions \* \* \* ."

The question at issue is the meaning and scope of "of whatever kind and in whatever form paid."

The comprehensive character of this provision has long been settled by this Court.

Thus, in *Old Colony Trust Company v. Commissioner of Internal Revenue*, 279 U. S. 716, in holding that a direct payment by a corporation of the personal income taxes of its officers constituted taxable income to such officers, Chief Justice Taft said (p. 729):

"The form of the payment is expressly declared to make no difference (§ 213, Revenue Act of 1918, chap. 18, 40 Stat. at L. 1065). It is therefore immaterial that the taxes were directly paid over to the government. The discharge by a third person of an obligation to him is equivalent to receipt by the person taxed."

In *Helvering v. Midland M. L. I. Co.*, 300 U. S. 216, this Court held that where, at the judicial sale under the judgment foreclosing its mortgage, the mortgagee bid the property in for the amount of the mortgage plus the accrued interest thereon, the interest was taxable income to the mortgagee reporting on a cash basis, Mr. Justice Brandeis saying (p. 222):

"Confessedly no interest was received in cash. The company insists that none was received in property. . . . We cannot say that Congress did not intend to include in its definition a case like the present merely because the taxpayer received a credit rather than money or other tangible property. Compare *Raybestos-Manhattan v. United States*, 296 U. S. 60, 62, 64, 80 L. ed. 44, 46, 56 S. Ct. 63, 102 A. L. R. 111. A receipt of interest is taxable as income whether paid in cash or by a credit. Compare *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 716, 73 L. ed. 918, 49 S. Ct. 499; *United States v. Boston & M. R. Co.*, 279 U. S. 732, 73 L. ed. 929, 49 S. Ct. 505. . . . The intent to use the full extent of power being clearly evident, we must not confine the legislation within narrow forms than the statutory language would indicate.

Compare *Irwin v. Gavit*, 268 U. S. 161, 166, 69 L. ed. 897, 898, 45 St. Ct. 475; *Helvering v. Stockholms Enskilda Bank*, *supra* (293 U. S. 89, 79 L. ed. 215, 55 St. Ct. 50)."

He further said (p. 224):

"Where the legal effect of a transaction fits the plain letter of the statute, the tax is held payable, unless there is clearly revealed in the Act itself or in its history a definite intention to exclude such transactions from the operation of its applicable language."

It cannot be and has not been disputed that, at bar, the legal effect of the acceptance of the assignment as payment of the fee discharged and extinguished the debt of the Misses Lynch for decedent's services. Accordingly, it cannot be gainsaid that the transaction fitted "the plain letter of the statute"; that compensation for personal services was paid in the form of property, viz., a portion of a chose in action, clearly property within the statutory limits "of whatever kind and in whatever form paid".

None of the reasons given by respondent or either of the courts below justified refusing to give effect to these forthright provisions of a plain and all-inclusive statute.

Thus, the Commissioner adopted (Record, p. 7) the expedient of ignoring the assignment, assuming that the original debt from the Misses Lynch was still owing. This ground necessarily fell with the finding of the Tax Court that the fee had in fact been paid in 1931 by the assignment.

The ground upon which the Tax Court sustained the deficiency was no less unsound since it interpolated into section 22a a proviso not thereby authorized. That ground was that the Tax Court was (p. 16):



“\* \* \* unable to find that the assignment \* \* \* had any market value in the year received or at any time prior to the death of decedent.”

The Tax Court pointed to no provision of section 22a or any other section of the 1928 Act which established market value as an essential ingredient of taxable income. On the other hand, this Court in *Helvering v. Enright*, 312 U. S. 636, clearly held that the taxability of income was neither dependent on the certainty of its value nor avoided by difficulty of evaluation. That case involved the includibility under section 42 in the taxable income of a decedent for the period in which fell the date of his death, of the value of his interest in a law partnership. This Court held that however uncertain might be the value of that interest because of unfinished matters in various stages of completion, whether taken on a straight fee or contingent fee basis, all were includible as accrued income, clearly indicating that the problem of valuation was one which had no relevance to the question of taxability, saying (p. 645):

“The completion of the work in progress was necessary to fix the amount due but the right to payment for work ordinarily arises on partial performance. Accrued income under § 42 for uncompleted operations includes the value of the services rendered by the decedent, capable of approximate valuation whether based on the agreed compensation or on *quantum meruit*. The requirement of valuation comprehends the elements of collectibility. The items here meet these tests and are subject to accrual.”

Thus, assuming that in the case at bar a problem of evaluation were presented, it would be entirely immaterial to the question of taxability.

However, no such problem of valuation was here ever present, in 1931 or at any time thereafter, because of the

explicit provisions of applicable Article 53 of Regulations 74 applying to the 1928 Act, quoted above, that in a case such as this where the amount of the fee had been fixed, "such price will be presumed to be the fair value of the compensation received". (In this connection, it may be appropriate to note that we respectfully differ with Judge Swan's construction of this provision (Record, p. 43). Bearing in mind that its usual operation is against a taxpayer, we think its correct meaning is that unless evidence establishes an actual, different value (as against uncertain value), the presumption controls).

Being unable to support the ground of the Tax Court, the Circuit Court of Appeals put its judgment upon two new grounds (a) that two decisions of this Court "require (d)" the ruling that the appeals from the decree upholding the basic claims prevented the partial assignment thereof from being taxable income, and (b) that the assignment was not property within the meaning of the income tax laws.

We think that a mere reading of the first of the cases cited in support of the first ground, *North American Oil v. Burnet*, 286 U. S. 417, is sufficient to show that the contrary was there held.

In that case, a receiver in 1917 paid to a corporation income which he had received in 1916 from the corporate property. The receiver made this payment pursuant to the decree dismissing the receivership suit. Appeals taken from the dismissal decree were not finally disposed of until 1922. If this Court had applied the principle laid down at bar by the Court below it would have held that the income was not taxable to the corporation until 1922. That

is precisely what this Court did not hold. It held that the income was taxable when received in 1917, and not in 1922, saying (p. 424):

"The net profits earned by the property in 1916 were not income of the year 1922—the year in which the litigation with the Government was finally terminated. They became income of the company in 1917, when it first became entitled to them and when it actually received them. If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent. See *Board v. Commissioner of Internal Revenue* (C. C. A. 6th) 51 F. (2d) 73, 75, 76. Compare *United States v. S. S. White Dental Mfg. Co.*, 274 U. S. 398, 403, 71 L. ed. 1120, 1123, 47 S. Ct. 598. If in 1922 the Government had prevailed, and the company had been obliged to refund the profits received in 1917, it would have been entitled to a deduction from the profits of 1922, not from those of any earlier year. Compare *Lucas v. American Code Co.*, 280 U. S. 445, 74 L. ed. 538, 67 A. L. R. 1010, 50 S. Ct. 202, *supra*."

The other decision cited in support of the first ground (*U. S. v. Safety Car Heating Co.*, 297 U. S. 88) did not involve the question here at issue.

Two questions were there involved, (a) whether profits from patent infringements earned by the infringer prior to February 25th, 1913, the effective date of the first income tax act, were free of income tax to the owner of the patent where the patent was not sustained until July, 1915 and the profits themselves not determined until 1923, and (b) whether the owner was entitled to a capital loss based upon the difference between the capitalized value of the profits as of February, 1913 and the lesser amount finally received on account thereof in 1925.

This Court held that because the capital fact of infringement was not determined until 1915, the claim to profits lacked the certainty essential to entitle the taxpayer to the benefit of the exemption of income earned prior to the effective date of the Sixteenth Amendment.

The notion that the appeal of the McArdle estate destroyed all value in the assignment is of course not tenable. The assignment was not merely of the decree which upheld the original claims but of the claims themselves (Record, p. 28). While the appeal may have cast some doubt upon the full value of the claims, it was no more doubtful than the hazard of collection in the Enright case which this Court dismissed with a single sentence (p. 645):

"The requirement of valuation comprehends the elements of collectibility."

The second ground of the Circuit Court of Appeals, that the assignment should not be "regarded as property within the meaning of the income tax law" is not supported by any reference to any section of that law. The apparent basis for the ruling was that, in decedent's hands, the claims against the McArdle estate should not be treated as "property of a different kind and subject to a different tax liability from the claims of his assigns".

If this were true, then property which is capital to an assignor could never be income to an assignee. Obviously, this cannot be correct. The determination of when property is income depends upon the consideration which caused its payment or delivery to the recipient, not upon its status in the hands of the payor. The Court below cites the case of a third party note as being income. Such a note might well be capital to the transferor yet, concededly, that fact would not prevent that same note from being income to

the transferee taking it as compensation for services. And insofar as the Court below differentiates such a note from the assignment here on the basis of possible negotiation in the market, it fell into the same error as the Tax Court.

Finally, in view of the explicit provision of Article 53 of Treasury Regulation 74 quoted above (p 11) under which the fixed fee charge of \$5000 was constituted the value of the assignment, the reasons below based on alleged lack of market value lose all substance.

## POINT II.

**Upon the conceded facts, section 42 of the Revenue Act, both in purpose and by its terms, was inapplicable.**

As this Court has said, the purpose of section 42 was to catch income to a decedent which otherwise would escape taxation.

*Putnam v. Commissioner*, 323 U. S. p. . . . ; 89 L. Ed. 734, 736.

That purpose is inapplicable here since, as we have shown, the assignment was taxable to decedent in 1931. Quite obviously, section 42 was here invoked only to evade the Statute of Limitations against any 1931 assessment, prescribed by section 275 (a) of the 1928 Act.

*cf.*, *Estate of Letz*, 45 B. T. A. 1011, 1017.

Moreover, section 42, by its terms, is here inapplicable for the further reason that if the assignment was not taxable in 1931, it surely was taxable in 1935 when decedent had the legal right to obtain \$1839.50 on account of it (Record, p. 37). Certainly, this was "a prior period" to

that in which fell decedent's death, in which the assignment was "properly includible".

### **Conclusion.**

For the foregoing reasons, it is submitted that this cause involves questions of primary importance in the interpretation and administration of the income tax laws which should be determined by this Court, justifying the issuance of a writ of certiorari.

Respectfully submitted,

WARNER PYNE,  
MONROE J. CAHN,  
*Counsel for Petitioners.*

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(1)

# **In the Supreme Court of the United States**

OCTOBER TERM, 1945

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No. 573

ESTATE OF HUMPHREY J. LYNCH, DECEASED, THE  
COUNTY TRUST COMPANY AND MARY A. FLEM-  
ING, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT*

---

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## **OPINIONS BELOW**

The memorandum opinion of the Tax Court (R. 14-16) is not officially reported. The opinion of the Circuit Court of Appeals (R. 35-40) and the dissenting opinion (R. 40-42) are reported in 150 F. 2d 747.

(1)



**JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on August 7, 1945 (R. 42). The petition for a writ of certiorari was filed on October 31, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

Whether, under Section 42 of the Revenue Act of 1938, legal fees earned in 1931 and never reported as income by the decedent who was on the cash basis of accounting, were properly includible as income in the return filed on behalf of the decedent's estate for the period January 1 to January 24, 1938, the date of his death, when, in 1931, the decedent had accepted from his clients a partial assignment, in an amount equal to his fee, of a Surrogate's Court's award to them out of an estate whose assets were held pending further order of the court and as to which appeals were pending at the time of the assignment, and when the decedent received nothing under this assigned claim before his death.

## STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

## SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; \* \* \*

\* \* \* \* \*

Section 22 (a) of the Revenue Act of 1938, c. 289, 52 Stat. 447, is identical with the above-quoted provision. Revenue Act of 1938, c. 289, 52 Stat. 447:

## SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; \* \* \*

## SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for

the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period.

Treasury Regulations 74, promulgated under the Revenue Act of 1938:

ART. 53. *Compensation paid other than in cash.*—Where services are paid for with something other than money, the fair market value of the thing taken in payment is the amount to be included as income. If the services were rendered at a stipulated price, in the absence of evidence to the contrary such price will be presumed to be the fair value of the compensation received.

#### STATEMENT

The facts found by the Tax Court are as follows: The decedent, Humphrey J. Lynch, a lawyer residing at White Plains, Westchester County, New York, died on January 24, 1938. Mary A. Fleming, executrix under his will, filed with the Collector of Internal Revenue for the Fourteenth District of New York an individual income tax return for the decedent's estate for the calendar year 1938, ending on January 24th of that year.

The return was on the cash receipts and disbursements basis, which basis had been used by the decedent at all times prior to his death. (R. 11.)

During 1931, the decedent, as legal counsel for Marguerite H. Lynch, Elizabeth F. Lynch, and Anna L. Lynch, had prosecuted claims in their behalf against the estate of John H. McArdle, deceased, in the Surrogate's Court of Westchester County, New York. On October 30, 1931, decedent succeeded in obtaining for them, from the Surrogate, a decree of settlement allowing claims totaling \$56,160. Interest on the claims and some other claims which had been made were disallowed. (R. 12.)

On November 16, 1931, Freda Rosenblum, an attorney employed by the decedent, wrote and mailed a letter to the Lynch sisters informing them that an assignment in the amount of \$7,000 of the money due them by virtue of the decree against the McArdle estate would be acceptable by the decedent in payment of his fee and it was stated that \$5,000 was for services already rendered while the remaining \$2,000 was to be compensation for work connected with an appeal which the decedent intended to file on behalf of his clients from the disallowance of interest and other claims by the Surrogate. The assignment, which was noninterest-bearing, was executed by the Lynch sisters on November 18, 1931. (R. 12.)

The decedent, for his clients, the Lynch sisters, on November 30, 1931, filed in the Surrogate's

Court a notice of appeal from that portion of the decree of October 30, 1931, which disallowed the interest and other additional claims against the estate of McArdle. In addition, on December 1, 1931, Mary E. Roche and Helen Abbey, devisees under the will of McArdle, filed notice of appeal in the Surrogate's Court of Westchester County from the Surrogate's decree of October 30, 1931, allowing the claims of the Lynch sisters. Both of these notices of appeal were ultimately withdrawn. (R. 12.)

In the decree of October 30, 1931, the Surrogate's Court found the value of the assets of the McArdle estate, based on an appraisal made at or about the time of McArdle's death, January, 1938, to be \$400,920.10 and the liabilities of the estate including the claims established by the decree to be \$139,780. In that decree the Surrogate ordered that the various assets of the estate be held subject to the further order of the court. Complete distribution of the estate and payment of the Lynch claims did not take place until 1940, or approximately two years after the death of the decedent. The delay in distribution and payment of claims was occasioned by a conflict among several of the claimants for priority in distribution; by the assertion of further claims against the estate based on assessments against National Bank stock, formerly an asset of the estate; and by the fact that the assets of the estate were not in a liquid

condition but were invested in real estate and securities. (R. 13.)

The decedent did not report the receipt of the assignment as income in his tax return for the calendar year 1931 or for any subsequent year (R. 13).

The Commissioner determined that the sum of \$5,000 earned by decedent in 1931, at which time he accepted from his clients a partial assignment of a claim which remained unpaid at the date of death and which was never reported by decedent who was on a cash receipts basis of accounting, was includible as income for the period ending with decedent's death (R. 13). The Tax Court (R. 16) and the Circuit Court of Appeals (R. 40) sustained the Commissioner's determination.

#### ARGUMENT

There is no conflict of decisions and none is pointed out by the taxpayers.

The decedent, who died on January 24, 1938, had never reported any amount as income as the result of the assignment to him, in 1931, of a portion of the Surrogate's award to his clients, the Lynch sisters. The distribution of \$5,000 to his estate in 1940 was the first payment made on account of this assignment.<sup>1</sup> The court below affirmed the Tax Court's holding that under Section 42 of the Revenue Act of 1938, *supra*, the

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<sup>1</sup> No claim is made that decedent was entitled to report income on any basis other than the cash basis.

amount was required to be included in the return for the taxable period in which fell the decedent's death as an amount "accrued up to the date of his death if not otherwise properly includible in \* \* \* a prior period."<sup>2</sup>

The taxpayers' only contention is that the amount was properly includible in decedent's return for 1931 or in the alternative in his return for 1935. In rejecting these contentions the court below correctly applied the principle embodied in *North American Oil v. Burnet*, 286 U. S. 417. In that case, a receiver held impounded property pending litigation between the United States and the North American Oil Company as to its beneficial ownership. Income earned from the property in 1916 was turned over to the company in 1917 upon entry of a final decree in the district court dismissing the bill of the United States. The appellate phases of the litigation were finally terminated in 1922. The question was whether the income should have been reported by the company in 1916, 1917 or 1922. The company's first contention was that the income was returnable in 1916 when earned. This Court held that the company was not required to report in 1916 as income an amount which it had not yet received

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<sup>2</sup>The term "accrued" is construed in this statute "in furtherance of the intent of Congress to cover into income the assets of decedents, earned during their life and unreported as income, which on a cash return, would appear in the estate returns." *Helvering v. Enright*, 312 U. S. 636, 644-645.

and which it might never receive. There was held to be no constructive receipt of the profits in 1916 because at no time during the year was there a right in the company to demand that the receiver pay over the money and during that time it was uncertain who would be entitled to the profits. It was held to be taxable in 1917 because actually received under a claim of right, though an appeal was pending. It seems clear that had the moneys not actually been received in 1917, the amount would have been income in 1922 rather than 1917 because of the pendency of the appeal. See *United States v. Safety Car Heating Co.*, 297 U. S. 88.

In the instant case, the decree of the Surrogate's Court of October 30, 1931, ordered that the assets of the McArdle estate be held subject to the further order of the court.<sup>3</sup> On December 1, 1931, an appeal was filed from the decree which had allowed the claim of the Lynch sisters, the decedent having already filed an appeal from portions of the decree disallowing certain claims of the Lynch sisters. At no time during the year 1931 was there a receipt of the sum or a right, either in the Lynch sisters or in the decedent, to demand that the court make any payment to anyone.

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<sup>3</sup> Delay in distribution was occasioned by conflicting claims of several claimants for priority in distribution, further claims against the estate based on assessments against National Bank stock, and the fact that assets were unliquid (R. 13).



There is no basis for the alternative contention that the claim became a legal right, that is, that it ceased to be a contingent claim, in 1935 and that the income was required to be reported for that year. This argument rests on the assumption that the appeals were withdrawn in 1935. But as observed by the court below (R. 39), there is no evidence as to when the appeals from the decree of the Surrogate's Court were withdrawn. The taxpayers had the burden of proof and on the basis of the record the Tax Court was not compelled to find that they were withdrawn in 1935 or any other period prior to the taxable period here involved.<sup>4</sup>

We submit that the lower court was correct in its application of *North American Oil v. Burnet*, *supra*, and *United States v. Safety Car Heating Co.*, *supra*, to this case.

The court below concluded that the assignment should not be regarded or treated as property the receipt of which gives rise to the realization of income within the meaning of the income tax laws. In other words, the court held, such an assignment is not realized gain to the assignee for he

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<sup>4</sup>Taxpayers' suggestion (Pet. 19) that the distribution of a dividend of .031141 (\$1,839.50) to the Lynch sisters in 1935 is proof of withdrawal of the appeals is without merit. As the court below observed (R. 39) it is "speculation whether this small dividend was occasioned by the withdrawal of the appeals or to other circumstances of which we have no knowledge."

acquires no greater rights at the time of the assignment than those of his assignor.

Both the Tax Court and the court below pointed out the distinction between such property as negotiable notes, which are treated as income when received, and judgments which do not meet the fundamental concept of realized gain. This distinction has been adopted elsewhere and in other situations. *Kyle v. Commissioner*, 43 F. 2d 291 (C. C. A. 3d), certiorari denied, 282 U. S. 896. See also, *Shuster v. Helvering*, 121 F. 2d 643 (C. C. A. 2d), which points out the same distinction as to contracts.

The taxpayers' further argument that the decisions below are in contradiction of Article 53 of Treasury Regulations 74 (1928), *supra*, is without merit. As stated by the Tax Court (R. 15), the theory of Article 53 of Treasury Regulations 74 is that the taxpayer receiving in return for his services property having a fair market value, "has actually received as income something of value equivalent, to the extent of that value, to cash, which is just as includible in his income as cash would be." Although the opinion of the Tax Court is for the most part devoted to the absence of any evidence as to the fair market value of the assignment, it is obvious from the above quoted statement that the decision also rests on the theory that the assignment of a portion of the judgment was not something of value which was equivalent

to cash. That was but another way of saying that such an assignment is not property within the meaning of the income tax laws. *Helvering v. Enright*, 312 U. S. 636, which involved the question whether the income had accrued at the time of death, rather than the question whether the income should have been reported as realized income in any prior period, is not to the contrary.

#### CONCLUSION

The decision below is correct; there is no conflict and the case does not call for further review.

Respectfully submitted,

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